Jurisdictional Statement

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81-1974

No. _____

In the Supreme Court of the United States

October Term, 1981

JACK HENRY, individually and as Personal Representative of the Estate of Lorene Henry, deceased,

Relator and Appellee,

vs.

THE DISTRICT COURT OF THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PHILLIPS, AND THE HONORABLE LEONARD H. LANGEN, JUDGE THEREOF,

Respondent,

and

BURLINGTON NORTHERN, INC.,

Respondent and Appellant.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether state statutes allowing a jury to determine the common law duty owed by a railroad to the public as to locomotive-mounted audible and visual warning devices have been preempted by the Boiler Inspection Act, 45 U.S.C. §§22-23, 28-43, and the Federal Railway Safety Act, 45 U.S.C. §§421-444, and regulations issued pursuant thereto.

2. Whether, even absent preemption by federal legislation, state imposition of standards regarding locomotive warning devices is prohibited because it constitutes an undue burden on interstate commerce.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

JACK HENRY, individually and as Personal Representative of the Estate of Lorene Henry, deceased,
Relator and Appellee,

v.

THE DISTRICT COURT OF THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PHILLIPS, AND THE HONORABLE LEONARD H. LANGEN, JUDGE THEREOF,
and
BURLINGTON NORTHERN, INC.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Opinion of the Supreme Court of Montana is reported at _____ P.2d _____, 39 Mont. Rptr. 430, and is printed in Appendix "A" hereto. The Order of the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Phillips, dated September 4, 1981, granting the Motion In Limine on the basis of federal preemption of state law, is printed in Appendix "B" hereto.

JURISDICTION

The nature of this proceeding is an appeal from a decision of the Montana Supreme Court upholding the validity of state laws against a challenge that application of such laws

has been preempted by the laws of the United States. [1] Jurisdiction is founded on 28 U.S.C. §1257 (2).

The decision of the Montana Supreme Court was rendered on February 25, 1982. The Notice of Appeal was filed March 24, 1982.

We believe the following cases sustain the appellate jurisdiction of this Court. This Court has held that an appeal lies from a state decision upholding the application of state laws against a challenge of federal preemption. In *McCarty v. McCarty*, _____ U.S. _____, 69 L.Ed. 2d 589, 101 S.Ct. 1813 (1981), relying on *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921), the Court upheld its appellate jurisdiction over a case in which state statutes were challenged as in conflict with federal law and the Commerce Clause.

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[1]This lawsuit was filed on June 4, 1979, against Burlington Northern, Inc. (BNI). Since that time, BNI has become a holding company of eight subsidiaries, seven of which are wholly owned. The only subsidiary not wholly owned is New Mexico and Arizona Land Company. This suit is directed to the BNI subsidiary, Burlington Northern Railroad Company. The following companies are partially owned subsidiaries of Burlington Northern Railroad Company: The Belt Railway Company of Chicago; Butte Pipe Line Company; Camas Prairie Railroad Company; Chicago Union Station Company; Davenport, Rock Island and North Western Railway Company; The Denver Union Terminal Railway Company; Fort Worth and Denver Railway Company; Houston Belt & Terminal Railway Company; Galveston Terminal Railway Company; Iowa Transfer Railway Company; Kansas City Terminal Railway Company; Keokuk Union Depot Company; The Lake Superior Terminal and Transfer Railway Company; Longview Switching Company; Portal Pipe Line Company; The Minnesota Transfer Railway Company; Paducah & Illinois Railroad Company; Portland Terminal Railroad Company; The Pueblo Union Depot and Railroad Company; The Saint Paul Union Depot Company; Terminal Railroad Association of St. Louis; Trailer Train Company; Western Fruit Express Company; The Wichita Union Terminal Railway Company; and Winona Bridge Railway Company.

This case falls within the *McCarty* rule. The Montana Code provides:

> In this state there is no common law in any case where the law is declared by statute.

MCA §1-1-108. In ruling that the jury should be permitted to deliberate whether appellant had a duty to equip its locomotive with warning devices other than those required by federal regulation, the Montana Supreme Court upheld the application of the following state statutes: MCA §§25-7-103, 26-1-202, 27-1-701, 28-1-201 (printed *infra* at pp. _____).

The decision of the Montana Supreme Court is a final judgment for purposes of this appeal. The application for a Writ of Supervisory Control is an original proceeding (see Appendix "F") similar to a proceeding for a writ of prohibition, which has been treated as a final judgment although further proceedings in the underlying action might occur. *See Bandini Petroleum Co. v. Superior Court, Los Angeles County,* 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136 (1931); *Missouri ex. rel. St. Louis B. & M. R. Co. v. Taylor,* 266 U.S. 200, 45 S.Ct. 47, 69 L.Ed. 247 (1924).

In addition, this Court has judicially created a number of exceptions to the rule that a judgment is not final if further proceedings are contemplated. In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975), four categories were identified in which the Court has taken appellate jurisdiction, even though further proceedings were anticipated in a lower state court. This case falls into the third category, described by Justice White as follows:

> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had,

> whatever the ultimate outcome of the case. Thus, in these cases, if the parties seeking interim review ultimately prevail on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts.

Id. 420 U.S. at 481.

APPLICABLE LAW

The following constitutional provisions and statutes are involved.

1. U. S. Constitution, Article I, §8, Clause 3:

> The Congress shall have power – *** to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; ***

2. U.S. Constitution, Article VI, Clause 2:

> This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

3. Boiler Inspection Act, 45 U.S.C. §§22-23, 28-43. (Printed in Appendix "C.")

4. Federal Railway Safety Act, 45 U.S.C. §421. (Printed in Appendix "D.") The most significant provision of the Federal Railway Safety Act for this appeal is 45 U.S.C. §434, which provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall

be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

5. 49 C.F.R. §§230.231, 230.234 (1978). (Printed in Appendix "E.")

6. MCA §1-1-108:

In this state there is no common law in any case where the law is declared by statute.

7. MCA §25-7-103:

All questions of fact, where the trial is by jury, other than those mentioned in 25-7-102 are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code.

8. MCA §26-1-202:

All questions of fact, where the trail is by jury, other than those mentioned in 26-1-201 are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code.

9. MCA §27-1-701:

Everyone is responsible not only for the results of his willful acts, but also for an injury occasioned to another by his want or ordinary care or skill in the manage-

ment of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

10. MCA §28-1-201:

Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of his rights.

11. Mont. Rule of Appellate Civil Procedure 17. (Printed in Appendix "F.")

STATEMENT OF THE CASE

An accident occurred on December 2, 1978, at a railroad crossing just outside Dodson, Montana. Appellee Henry was driving his pickup truck, in which his wife and his son were passengers, from the Nicholson Ranch toward Dodson. Appellant's eastbound train struck the pickup truck, resulting in the death of appellee's wife.

The lead unit of the train was equipped with two sealed beam headlights, which were in good operating condition, and which met and exceeded federal requirements for visual warning devices. In addition, the lead unit was equipped with an amber rotating light, mounted on top of the unit in the center near the front of the locomotive. The locomotive was also equipped with an air-powered whistle which was in good operating condition and met federal requirements for audible warning devices.

A lawsuit was filed by Appellee Henry against Burlington Northern, Inc., *et. al.*, on June 4, 1979, in the District Court of the Seventeenth Judicial District of the State of Montana In and For the County of Phillips as Cause No. 6455. Henry alleged *inter alia*, that BN employees were negligent in several particulars in the operation of the train; that BN was negligent in permitting hay

to be stacked near the crossing; that BN was negligent in failing to equip its locomotive with an oscillating or "mars" headlight; that BN was negligent in failing to equip its locomotive with a strobe light; and that the locomotive whistle was not sounded. Discovery was thereafter conducted by the parties and trial was set to commence September 14, 1981.

On April 30, 1981, BN filed a Motion In Limine which requested the court for an order "enjoining plaintiff, plaintiff's witnesses, and plaintiff's counsel from mentioning . . . locomotive mounted warning devices, either visual or audible, other than those which were actually mounted upon the Burlington Northern, Inc. locomotive unit which was involved in the accident . . . ." The court granted this motion. By Order dated September 4, 1981, (see Appendix "B"), it found:

> Burlington Northern's only duty in this case with respect to audible and visual warning devices on this locomotive at the time of the accident was to comply with the applicable regulations on the subject. The jury will not be permitted to deliberate on whether Burlington Northern had a duty to equip its engine in accordance with the standard exceeding those set by the regulations.
>
> *The court finds that the federal government, pursuant to its plenary powers in the field of interstate commerce, has seen fit to pre-empt state action in determining the standard of care or duty required of the BN railroad insofar as equipping its railway engines with audible and visual warning devices is concerned.* (Emphasis added.)

The district court also granted Henry's motion to vacate the trial setting to allow him an opportunity to file a Writ of Supervisory Control so that the Montana Supreme Court could determine the preemption issue.

On September 22, 1981, the appellee filed an application in the Supreme Court of the State of Montana for an extraordinary writ denominated a Writ of Supervisory Control, pursuant to M.R.App.Civ.Pro. 17. (See Appendix "E.") In the application, the respondent asked that a writ be issued to the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Phillips, and to the Honorable Leonard H. Langen, the Judge of said court, ordering that the District Court Order granting the motion in limine be reversed. The application was briefed and argued by the parties. On February 25, 1982, the Supreme Court of the State of Montana issued its opinion granting the Writ of Supervisory Control. (See Appendix "A.")

STATEMENT OF REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

There are two substantial questions presented in this appeal. Both questions involve the supremacy of federal law over state law.

1. We first address the issue of preemption of state standards by the Boiler Inspection Act, as amended, 45 U.S.C. §§22-23, 28-43, the Federal Railway Safety Act (hereinafter FRSA), 45 U.S.C. §421-444. On this issue, the Montana Supreme Court held:

> Respondent's (BN) contention that this case involves preemption is misplaced. The doctrine of preemption deals with federal and state relations under the Supremacy Clause of Article XI of the United States Constitution. There is no conflict in this case between a federal statute and a state statute. Further, by allowing a jury to determine if the BN violated its common-law duty, this Court is not implementing its own standard. The Federal Railway Safety Act, 45 U.S.C. §§421-444,

> provides that engines must be equipped with a headlight which will illuminate a person on the tracks at a distance of 800 feet. No federal enactment governs warning systems on the engines. The proof sought here to be offered by plaintiff relates to warning and not to illumination. We hold Congress has preempted the area of illumination devices but not warning devices.

This holding is, we respectfully assert, erroneous in at least four respects. First, preemption *is* involved. The court itself held that Congress had preempted the area of illumination devices. Second, the court erred in holding that preemption does not apply unless there is a conflict between a federal *statute* and a state *statute*. Third, the court's statement that the FRSA provides that engines be equipped with a headlight is erroneous. The FRSA mandates uniform national standards and allows the Secretary of Transportation, through the Federal Railway Administration (FRA) to implement rules and regulations governing railroad safety. These regulations of the Department of Transportation specify the equipment to be installed on a locomotive. Finally, the court's interpretation of the FRSA and regulations of the Department of Transportation is so narrow that it contravenes the legislative intent underlying the FRSA. We address these errors in turn.

Contrary to the Montana Supreme Court's ruling, the preemption issue is unquestionably central to this case. Where a state court summarily rejects federal preemption and thereby imposes a substantial burden on interstate commerce, full review by this Court is critical. Here, with little discussion, the Montana court rejected and reversed the state district court's ruling that the jury would not be permitted to deliberate on the reasonableness of BN's locomotive warning devices. This holding imposes a substantial burden on the railroad, one which the United States Con-

gress and prior decisions of this Court have already determined is not in the public interest.

Full review by this Court is also critical because the decision conflicts with the holding of the highest court of another state. In *Wiedenfeld v. Chicago & Northwestern Transportation Co.*, 252 N.W. 2d 691 (Iowa 1977), the Iowa Supreme Court, finding that preemption *was* involved, ruled that the federal regulations controlled and that the issue of the duty of a railroad to equip trains with lights other than those required by federal regulations should not be presented to a jury. *Id.* at 697. These conflicting decisions present a substantial question on the supremacy of a federal statute.

The second serious error identified above is that federal preemption does not apply unless there is a conflict between a federal *statute* and a state *statute*. The court stated that by allowing a jury to determine if BN violated its common law duty, the court was not thereby implementing its own standards. The court relied on its prior decision in *Runkle v. Burlington Northern, Inc.*, 613 P.2d 982 (Mont. 1980). The preemption issue, however, was not squarely presented in *Runkle*. Further, in the cases relied on in the *Runkle* decision, the argument of preemption was not presented and neither the FRSA nor any other federal statute was even mentioned.

The decision below ignores cases in which this Court has held that common law actions may be preempted by the United States Constitution and federal legislation. Many of these preemption decisions have involved the railroad industry. Recently, in *Chicago & North Western Transportation Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed. 2d 258 (1981), this Court held that the Interstate Commerce Act precluded a shipper from pressing a state court damages action against an interstate rail carrier since the ICC had determined the question of reasonableness and the

state statutes were inconsistent with both the letter and spirit of the Interstate Commerce Act. In deciding whether a conflict between state and federal law is present, this Court wrote, "a court's concern is necessarily with 'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.' " 67 L.Ed.2d at 265. This Court noted that since the turn of the century, it has frequently invalidated attempts by states to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Interstate Commerce Act. The Court then cited several cases in which it has struck down a state's common law cause of action against railroads. In one such case, *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.Ed. 553, 27 S.Ct. 350 (1907), the Court explained:

> For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed.

Id. 204 U.S. at 446. *See also Nader v. Allegeny Airlines*, 426 U.S. 290, 48 L.Ed.2d 643, 96 S.Ct. 1978 (1976); *American Trucking Association v. Atchison, Topeka & Santa Fe Rail-*

way, 387 U.S. 397, 406, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967).

The burden on interstate commerce imposed by decisions such as that appealed from here was explained by this Court long ago in *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1913):

> [T]his branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in the business . . . to know, without considerable investigation and trouble, and even then oftimes with but little certainty, what would be the carrier's actual responsibility.

See also Farmer v. United Brotherhood of Carpenters and Joiners, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977); *Andrews v. Louisville and Nashville Railroad*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed. 2d 95 (1972); *Magnuson v. Burlington Northern Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

In *Silkwood v. The Kerr-McGee Corp.*, 667 F.2d 908, 923 (10th Cir. 1981), the court overturned an award of punitive damages on the basis of federal preemption, explaining: "A judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state."

By overturning the state district court's decision, the Montana Supreme Court thwarted, in Montana, as well as in other states in which BN operates, the congressional determination that safety is best achieved through *uniformity*. The court stated: "No federal enactment governs warning systems on the engines." Although the court did not elaborate, we assume it meant that federal regulations, narrowly construed, do not specify which *warning* systems must be installed and, therefore, juries may deliberate on this question.

This holding will have serious and widespread consequences. Such a construction would permit enforcement of almost any state statute, regulation, or standard because such fine distinctions as to the subject matter of a regulation can nearly always be drawn if the state regulation is not identical to the federal regulation. The history of the Boiler Inspection Act and the FRSA clearly demonstrate that such a narrow interpretation of federal regulations was not intended. We review this history briefly.

In 1911, Congress passed the first Boiler Inspection Act, now codified at 45 U.S.C. §§22-23, 28-43. This act conferred upon the ICC the power to compel common carriers to equip their locomotives with safe and suitable boilers. Act of Feb. 17, 1911, Ch. 103, 36 Stat. 913. In 1915, Congress extended the Interstate Commerce Commission's authority under this act to the entire locomotive. Act of March 4, 1915, Ch. 169, 38 Stat. 1192.[2] This Court has held that the Boiler Inspection Act and subsequent amendments gave the ICC a broad scope of authority.[3] *Napier v. Atlantic Coastline Railroad Company*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926). In *Napier*, the Court held that, although no federal regulation had been issued nor statute passed requiring either a particular type of fire box door or a cab curtain, state statutes requiring such equipment were preempted. The conflict arose "because the federal and state statutes are directed to the same subject – the equipment of locomo-

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[2]This administrative authority was transferred to the Secretary of Transportation by Pub. L. No. 89-670, 80 Stat. 931 (1966), which created the Department of Transportation.

[3]Prior to the passage of the Boiler Inspection Act, Congress had enacted the Safety Appliance Act, ch. 196, 27 Stat. 531, March 2, 1893. In *Southern Ry. Co. v. Railroad Comm'n of Ind.*, 236 U.S. 439, 35 S.Ct. 304, 59 L.Ed. 661 (1915), this Court held that Congress had so far occupied the field relating to equipment of railway cars as to supersede existing state legislation.

tives. They operate upon the same object." *Id.* 272 U.S. at 612. This broad interpretation was adopted because "the Boiler Inspection Act . . . was intended to occupy the field." *Id.* at 613.

The Boiler Inspection Act also preempted state standards regarding warning devices on locomotives. *See, e.g., Brown v. Chicago R. I. & P. R. Co.*, 108 F.Supp. 164 (N.D. Iowa 1952); *Waller v. Southern Pacific Company*, 37 F.Supp. 475 (N.D. Cal. 1941); *Northern Pacific Railway v. Cooney*, 12 F.Supp. 73 (D. Mt. 1935). In *Brown*, the court rejected the argument that a state may prescribe requirements more stringent than federal requirements, holding that the federal regulation prescribed the duty owed by the railroad to members of the public and was not merely a "minimum requirement."

In 1970, Congress enacted the FRSA "to promote safety in all areas of railroad operation and to reduce railroad-related accidents. . . ." 45 U.S.C. §421. In section 434 of the FRSA, Congress specifically addressed preemption:

> *The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable.* A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

(Emphasis added.) Congress thus declared its intent that standards relating to railroad safety *shall be nationally uniform* to the extent practicable, thereby adopting the House Committee on Interstate and Foreign Commerce's unanimous recommendation that "broad Federal regulatory authority over all areas of railroad safety be enacted." H.R.Rep. No. 1194, 91st Cong., 2nd Sess., 1970 U.S. Code Cong. & Ad. N. 4104, 4108. The reasons for the committee's decision were:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, *it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system.* Unlike the gas pipelines, the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many State lines. Illustrative of this is the newly formed Burlington Northern, which including subsidiaries, operates in 19 states . . . In addition to the obvious areas of *rolling stock*, and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross State lines. *To subject a carrier to enforcement before a number of different States administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.*

Id. at 4110-4111 (emphasis added).

The congressional committee considering the FRSA recognized federal preemption of this field. *Id.* at 4108. It decided, however, to recommend that a narrow exception to this federal preemption by drawn. Under the second sentence of section 434, a state may act *until* the Secretary has adopted a rule, regulation, order, or standard "covering the

subject matter" of such state requirement.[4]

As demonstrated by the cases cited above, it was decided many years ago that the federal government had acted on the subject matter of warning devices on locomotives. *Brown v. Chicago, R. I. & P. R. Co.*, 108 F.Supp. 164, 168 (N.D.Iowa 1952); *Pennsylvania Railroad Company v. Pelsor*, 168 N.E. 249 (Ind. App. 1929); *Northern Pacific Railway Company v. Cooney*, 12 F.Supp. 73, 75 (D. Mont. 1935). At the time of the accident giving rise to this lawsuit, the Secretary of Transportation, through the FRA, had promulgated regulations covering both visual and audible warning devices on locomotives. 49 C.F.R. §§230.231, 230.234 (now 49 C.F.R. §§229.125, 229.129). (See Appendix "D.") The section regarding visual illumination, 49 C.F.R. §230.231, provided in part:

> *Road locomotives.* Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

Yet the Montana Supreme Court held that there is no federal regulation concerning visual warning devices on

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[4]The third sentence of §434 of FRSA creates a second exception which allows a state to "adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." In its decision, the Montana Supreme Court did not rely upon or mention this exception.

locomotives because the federal regulation was adopted for purposes of illumination rather than warning. The regulation's measure of illumination, however, does not determine its sole purpose. A headlight both illuminates and warns. A light which allows a person in the cab to see the track at the same time allows motorists to see the train. Even if the regulation's purpose were only illumination, the test under section 434 is whether the general subject matter has been addressed by federal regulation, not what the purpose of such regulation is.

The Montana Supreme Court failed to construe the FRSA so as to effectuate the congressional goal of enhancing railroad safety through national uniformity. By a narrow construction of the phrase "subject matter," the purpose of the act has been frustrated. The decision allows state standards to be adopted and enforced on an area which Congress has stated is of national concern.

The Montana Supreme Court did not reveal the reasons for its decision, nor discuss any of the relevant cases construing the phrase "subject matter." Several courts have interpreted "subject matter" broadly, in keeping with the legislative objective of national uniformity. See *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3rd Cir. 1976); *Donelon v. New Orleans Terminal Company*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); *Atchison, Topeka & Santa Fe Railway v. Illinois Commerce Commission*, 453 F.Supp. 920 (N.D. Ill. 1977); *Black v. Baltimore & Ohio Railroad Company*, 398 N.E.2d 1361 (Ind. App. 1980). These cases enforce the statutory mandate of national uniformity and conform to this Court's prior decisions in cases such as *Napier v. Atlantic Coast Railroad Company, supra*. In *Napier*, the state action was preempted because the Boiler Inspection Act covered the subject of "the equipment of locomotives." Certainly, if that test is applied, then a jury verdict imposing a standard as to *any type* of locomotive equipment is

preempted because the subject matter of locomotive equipment is covered by federal regulation.

A narrower interpretation is that the federal regulations cover *locomotive lights,* and therefore a state may not adopt a standard relating to locomotive lights. Yet a narrower interpretation is that the federal regulations cover *locomotive headlights*, and therefore any jury verdict imposing a more stringent standard, such as a requirement of oscillating headlights, is preempted. The most narrow interpretation, and that adopted by the Montana Supreme Court, is that the federal regulations cover the subject of locomotive *"illuminating lights,"* and therefore only those state standards or regulations dealing with lights intended to illuminate rather than warn are preempted. This restricted interpretation of the federal statute by a state court presents a substantial question that merits full review in this Court.

2. The Montana Supreme Court failed to address BN's arguments regarding undue burdens on interstate commerce. BN had argued that allowing juries to set standards as to reasonableness of locomotive equipment that travels through many states substantially interferes with interstate commerce. The state court's refusal to consider this important constitutional question merits full review by this Court.

The test to determine the validity of state actions affecting interstate commerce is set forth in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed. 2d 174 (1970):

> Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.*

397 U.S. at 142 (emphasis added). *See also Lewis v. B. T. Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). The *Pike* test presents a "problem of balance" between legitimate local interests and the burden imposed upon interstate commerce. *Great Atlantic and Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 96 S. Ct. 923, 47 L.Ed.2d 55 (1976).

In analyzing the state standard to determine its validity, the court must look to the standard's "practical operation" and "probable effects," *Lewis v. B. T. Investment Managers, Inc., supra*, 447 U.S. at 37, or to its "practical impact," *Hughes v. Oklahoma, supra*, 441 U.S. at 336.

Southern Pac. Co. v. State of Arizona, 325 U.S. 761, 65 S. Ct. 1515, 89 L.Ed. 1915 (1945), struck down an Arizona statute that limited the length of trains on the basis that the asserted local benefit did not outweigh the burden:

> The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so *slight or problematical* as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulations which do not have a uniform effect on the interstate train journey which it interrupts.

325 U.S. at 775, 776 (emphasis added). The Court noted that the practical effect of the regulation was "to control train operations beyond the boundaries of the state enacting it...." 325 U.S. at 775. *Southern Pac. Co.* emphasized repeatedly the importance of uniformity of railroad regulation, particularly with respect to "structure, design, equipment and operation [of vessels plying interstate]..." 325 U.S. at 781. These same considerations apply to the case here appealed.

Regulation of equipment on instrumentalities of interstate commerce also was considered in *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 79 S. Ct. 962, 3 L.Ed.2d 1003 (1959). In striking down a state statute, *Bibb* stated:

> A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory. Such a new safety device — out of line with the requirements of the States — may be so compelling that the innovating State need not be the one to give way. But the present showing — balanced against the clear burden on commerce — is far too *inconclusive* to make this mudguard meet that test.

359 U.S. at 529, 530 (emphasis added). Similar problems caused the Court in *Raymond Motor Transporation, Inc. v. Rice*, 434 U.S. 429, 98 S. Ct. 787, 54 L.Ed.2d 664 (1978), to hold that a Wisconsin regulation prohibiting double trailer trucks was an unconstitutional burden on interstate commerce. The holding in *Raymond* was reiterated by the Court in *Kassel v. Consolidated Freightways*, 450 U.S. 662, 101 S. Ct. 1309, 67 L.Ed.2d 580 (1981).[5]

The burden upon interstate commerce in *Raymond* and *Kassel* – detouring around the state or detaching the doubles and shipping them separately at an additional expense of about 12.6 million dollars each year – is the same type of burden as would be imposed by the decision below. Jury verdicts, in many instances, will be based upon expert testimony which may or may not be valid. The jury verdicts, which then become transformed by court judgments

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[5]Early decisions such as *Atlantic Coast Line Railroad Co. v. Georgia*, 234 U.S. 280, 34 S.Ct. 829, 58 L.Ed. 1312 (1914) are clearly outdated by the tests adopted in the recent decisions in *Pike, Bibb, Raymond Motor Transportation, Kassel*, and other cases.

into state standards, clearly have extra-territorial impact.

Unless all of BN's locomotives are equipped to comply with the particular standards of each state, a prohibitively costly exercise, locomotives would have to be switched at state borders. In addition, switching locomotives at state lines would require construction of sidetracks and switching facilities and would delay interstate trains. Unlike trucks, trains simply cannot detour around the state.

The potential burden of lack of uniformity is obvious. The requirements as to location of lights on the locomotive, number and intensity of the lights, and other characteristics of lights may vary from verdict to verdict and from state to state. The cost of installing strobe lights and other lights is substantial. These burdens must be weighed against the problematical and speculative safety benefits from installation of additional warning lights such as strobe lights. The Montana Court did not engage in this analysis. If the evidence on the safety benefits of strobe lights is "slight or problematical" (*Southern Pac. Co. v. Arizona, supra*), "inconclusive" (*Bibb v. Navaho Freight Lines, supra*), or "speculative" (*Raymond Motor Transportation, Inc. v. Rice, supra*), then the standard is impermissible. The inconclusive and speculative evidence on strobe lights is demonstrated by statistics analyzed by the FRA in connection with proposed rule making.[6] (Appendix "B" to Response and Brief of Respondent Burlington Northern, Inc. in opposition to Application For Writ of Supervisory Control.) The statistics do not indicate any enhancement of safety with strobe lights when compared to the amber rotating light with which BN locomotives, including the one involved in this accident, are equipped. The study

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[6]The Supreme Court has relied on statistical studies in determining the "putative local benefit." *Kassel v. Consolidated Freightways, supra; Southern Pac. Co. v. State of Arizona, supra.*

shows that the results have been inconclusive and that further testing is required before definite conclusions are reached as to the effectiveness and reliability of strobe lights.

Under these circumstances, the burden here is substantial, while the putative benefit to the state is "inconclusive," "speculative," and "problematical." The Montana Supreme Court apparently felt no need to apply the test because of what we believe to be its erroneous view that the court was not implementing its own standard by permitting a jury to determine if the railroad violated its "common law" duty.

If the legislature of the State of Montana enacted a statute requiring BN to equip its trains with warning lights such as strobe lights or oscillating lights, the statute unquestionably would be struck down under the tests established in *Pike, Bibb, Raymond* and their progeny. The result should be no different where such locomotive equipment is required in response to judicially-created standards. In this appeal, the Court has the opportunity to clarify this constitutional question of great importance to interstate carriers.

CONCLUSION

Probable jurisdiction should be noted. If the Court determines that the case is not properly appealed, a Writ of Certiorari to review the decision of the Montana Supreme Court should be granted.

Respectfully submitted,

JACK RAMIREZ
CAROLYN S. OSTBY
Attorneys for Appellant.

CERTIFICATE OF SERVICE

The undersigned, CAROLYN S. OSTBY, a member of the Bar of the Supreme Court of the United States, does hereby certify that she served copies of the Jurisdictional Statement on the 14th day of April, 1982, by mailing three copies each to the following:

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Hon. Leonard H. Langen
District Court Judge
Phillpis County Courthouse
Malta, Montana 59538

s/ Carolyn S. Ostby
Carolyn S. Ostby

Appendix

APPENDIX "A"

STATE REPORTER
Box 749
Helena, Montana

VOLUME 39

NO. 81-420

JACK HENRY et al.,

Relator,

v.

Submitted: Jan. 11, 1982
Decided: Feb. 25, 1982

DISTRICT COURT OF THE
SEVENTEENTH JUDICIAL DISTRICT,
et al.,

Respondent.

RAILROADS, Petition for Writ of Supervisory Control and a Motion for a Stay of Proceedings involving a Negligence Claim against Burlington Northern, Whether Federal Legislation has Preempted the State from Imposing a Common-Law Duty on Railroad Carriers to have Additional Warning Devices mounted on their Locomotives, Whether the Proceedings in this case should be Stayed until the United States Court of Appeals for the Ninth Circuit renders a Decision on the issue of Preemption—SUPERVISORY CONTROL

ORIGINAL PROCEEDING.

For Relators: Hoyt and Trieweiler, Great Falls
Goetz, Madden & Dunn, Bozeman

For Respondents: Crowley, Haughey, Hanson, Toole & Dietrich, Billings

Mr. John Hoyt argued the case orally for Relators.

Opinion by Justice Daley; Chief Justice Haswell and Justices Harrison, Shea, Sheehy, Morrison and Weber concurred.

Petition granted; Stay denied.

Mr. Justice Daly delivered the Opinion of the Court.

This is a case involving a petition for a writ of supervisory control and a motion for stay of proceedings. The case initially arose in the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Phillips.

A claim was filed in District Court against Burlington Northern, Inc., et al. (hereinafter BN) on June 4, 1979. The claim alleged that BN's negligence at the west Dodson railroad crossing resulted in the injuries sustained by the relator, Jack Henry, and caused the death of his wife, Lorene Henry. There were several alleged "acts" committed by BN that were the bases of the negligence claim. These acts included: permitting hay to be stacked near a crossing; failing to sound a proper warning whistle; and failing to equip its locomotive with an oscillating headlight and a strobe light.

On April 30, 1981, BN filed a motion in limine in the District Court. The motion requested the court to enjoin the relator, his witnesses, and his counsel from mentioning anything about locomotive mounted warning devices, either visual or audible, other than those used on the locomotive in question. The District Court granted the motion stating:

"Burlington Northern's only duty in this case with respect to audible and visual warning devices on this locomotive at the time of the accident was to comply with the applicable regulations on the subject. The jury will not

be permitted to deliberate on whether Burlington Northern had a duty to equip its engine in accordance with the standard exceeding those set by the regulations.

"The Court finds that the federal government, pursuant to its plenary powers in the field of interstate commerce, has seen fit to preempt state action in determining the standard of care or duty required of the BN railroad insofar as equipping its railway engines with audible and visual warning devices is concerned."

At the same time the District Court stayed the proceedings to allow the relator to file a writ of supervisory control so that this Court could review the propriety of the District Court's order. This Court issued an order on October 2, 1981, directing BN to respond to the relator's application for the writ of supervisory control.

Shortly thereafter, on October 7, 1981, BN filed a motion for stay of proceedings in this Court pending a decision by the United States Court of Appeals for the Ninth Circuit in the case of Mary Marshall, etc. v. Burlington Northern, Inc., Case No. CA, Docket No. 81-3161. This Court then ordered in pertinent part:

"1. That respondents file their response and brief to relator's application for writ of supervisory control in this Court on or before October 30, 1981.

"2. That relator file his response and brief to respondents' motion to stay proceedings on or before October 30, 1981.

"3. That each party thereafter have to and including November 13, 1981, in which to file reply memoranda to the adverse party's responsive briefs. Relator's reply memorandum shall relate solely to issues raised on his application for supervisory control. Respondents' reply memorandum shall relate solely to issues raised on its motion for stay of proceedings.

"4. The parties shall serve copies of all documents filed upon counsel of record.

"5. All matters now pending in this cause are held in

abeyance pending further order of this Court. . . "

As a result of these orders, it is now necessary that this Court address both the motion to stay the proceedings and the application for the writ of supervisory control. The relator has raised a further issue regarding the admission of evidence of other accidents. However, this issue was not presented to the District Court for a determination and, therefore, will not be addressed in this instance.

Therefore, the issues presented for review are:

1. Whether federal legislation has preempted the state from imposing a common-law duty on railroad carriers to have additional warning devices mounted on their locomotives?

2. Whether the proceedings in this case should be stayed until the United States Court of Appeals for the Ninth Circuit renders a decision on the issue of preemption?

BN contends that Congress, through the Federal Railway Safety Act, 45 U.S.C. sections 421-444, and the Boiler Inspection Act, 45 U.S.C. section 22-23, section 28-43, has preempted all state standards, statutes and common-law doctrines affecting railroad safety. It contends that the states connot, without narrow exceptions, interfere with the federal government in the area of interstate commerce. Therefore, BN contends as the District Court held, that "...Burlington Northern's only duty in this case with respect to audible and visual warning devices on this locomotive at the time of the accident was to comply with the applicable federal regulations on the subject", and that "[t]he jury will not be permitted to deliberate on whether Burlington Northern had a duty to equip its engine in accordance with a standard exceeding those set by the regulations."

Respondent's contention and the District Court's ruling are contrary to the case law of Montana. In Runkle v. Burlington Northern (1980), _____Mont._____, 613 P.2d 982, 37 St.Rep. 995, this Court held:

"Thus it may not be enough for the railroad to protect its crossing with a standard crossbuck, to operate a train without a speed limit or to blow the whistle and ring the bell. *The jury is still permitted to determine whether the railroad exercised reasonable care and caution under the circumstances and conditions existing at the time of the accident. Whether a railroad is negligent in a particular manner, such as in failing to provide automatic crossing gates, oscillating headlights, flasher lights, or in failing to reduce its speed is a question of fact for the jury.*" 613 P.2d at 991. (Emphasis supplied.)

It is clear from the language in *Runkle* that a jury should be permitted to deliberate on whether BN had a common-law duty to equip its locomotive with various warning devices.

Montana is not the only jurisdiction that has ruled in this manner. The Supreme Court of Arizona held in DeElena v. Southern Pac. Co. (1979), 121 Ariz. 563, 592 P.2d 759:

"...whether a railroad is negligent in a particular manner, such as failing to provide automatic crossing gates, is a question of fact for the jury.

"...Ordinarily the issue of the negligence in crossing cases, whether the railroad was negligent in the design and maintenance of the crossing or in the operation of the train, is one of fact as in other negligence cases. (Id. [Peri v. L.A. Junction Ry., 22 Cal. 2d] at 120, 137 P.2d 441; Wilkinson v. Southern Pacific Co., 224 Cal. App. 2d 478, 487-488, 36 Cal. Rptr. 689)...

"*A railroad company is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules; the circumstances may require it to do more.* (Hogue v. Southern Pacific Co., supra, 1 Cal. 3d at 258, 81 Cal. Rptr. 765, 460 P.2d 965)..." 592 P.2d at 762. (Emphasis supplied.)

Also see, Seaboard Coast Line R. Co. v. Buchman (Fla. App. 1978), 358 So.2d 836.

Respondent's contention that this case involves preemption is misplaced. The doctrine of preemption deals with federal and state relations under the Supremacy Clause of Article XI of the United States Constitution. There is no conflict in this case between a federal statute and a state statute. Further, by allowing a jury to determine if the BN violated its common-law duty, this Court is not implementing its own standard. The Federal Railway Safety Act, 45 U.S.C. sections 421-444, provides that engines must be equipped with a headlight which will illuminate a person on the tracks at a distance of 800 feet. No federal enactment governs warning systems on the engines. The proof sought here to be offered by plaintiff relates to warning and not to illumination. We hold Congress has preempted the area of illumination devices but not warning devices.

Respondent has made a motion to stay the proceedings in this Court until the United States Court of Appeals for the Ninth Circuit has rendered a decision in the case of Marshall v. Burlington Northern, Inc., Case No. CA, Docket No. 81-3161. Respondent contends that a stay in these proceedings should be granted because: there is a substantial risk of conflicting decisions between the Ninth Circuit in the *Marshall* case and our decision in this case; the issue is a federal question which is more appropriately decided by the federal courts; the risk of conflicting decisions will create a dilemma for BN in operating its trains in Montana and other states; and the interests of justice, judicial economy, and good court administration requires this Court to do so.

The leading case on when a stay of proceedings motion should be granted is Landis v. North American Co. (1936), 299 U.S. 248, 57 S. Ct. 163, 81 L.Ed. 153. The various pronouncements of Landis have been followed and reestablished over the years. The court in Dellinger v. Mitchell (D.C. Cir. 1971), 442 F.2d 782, sets out the important legal considerations, initially brought out in *Landis*, to

follow when determining whether a stay in the proceedings should be utilized. The court stated:

"1. A court has inherent power to stay proceedings in control of its docket—after balancing the competing interests. [Footnote omitted.]

"2. *'The suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.'* 299 U.S. at 255, 57 S.Ct. at 166. [Emphasis added.]

"3. 'Especially in cases of extraordinary public moment, the individual may be required to submit to delay and not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.' 299 U.S. at 256, 57 S.Ct. at 166." 442 F.2d at 786.

When the analysis from Landis is applied to the facts of the case at bar it becomes evident that the motion to stay the proceedings should not be granted.

First, this Court does not believe that there is a federal preemption question involved in this case; therefore, there is not a substantial risk of conflicting decision. Second, respondent has not sufficiently demonstrated that, by allowing a jury to deliberate on the question of a common-law duty, a great hardship will befall it. Third, respondent has failed to satisfy this Court that the hardship on relator is less burdensome than that on respondent or that "some delay is in his [relator's] own interest." Fourth, and as respondent argues, the granting of a stay rests within the discretion of the court. It is very doubtful that the "judicial economy" of the court will be adversely affected by refusing the respondent's motion.

The petition for a writ of supervisory control is granted pursuant to the rationale set out in this opinion. The

motion for stay of proceedings is denied for the reasons discussed above.

APPENDIX "B"

IN THE DISTRICT COURT OF THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PHILLIPS

JACK HENRY, Individually and as Personal Representative of the estate of LORENE HENRY, deceased,	)	Civil No. 6455
Plaintiff,	)	
vs.	)	
BURLINGTON NORTHERN INC., a corporation, MAURICE E. HAGEN, Individually and as Superintendent of BURLINGTON NORTHERN INC., and GENERAL MOTORS CORP.,	)	ORDER
Defendants.	)	

By motion dated April 30, 1981, the defendant, BURLINGTON NORTHERN, INC., filed its motion in limine which is in the following words:

> "***for an order enjoining plaintiff, plaintiff's witnesses, and plaintiff's counsel from mentioning, referring to or interrogating concerning, in the presence of of the jury, the efficacy of, the availability of, the use of or the propriety, legal or otherwise, of using locomotive mounted warning devices, either visual or audible, other than those which were actually mounted

upon the Burlington Northern Inc. locomotive unit which was involved in the accident which underlies this lawsuit. More particularly, but not in limitation of what is requested above plaintiff's counsel, his witnesses and plaintiff himself should be precluded from presenting any evidence as to strobe lights, oscillating lights, alternative bells or whistles or any other warning devices in addition to those required by appropriate federal regulation."

The Court heard oral argument on the motion on August 27, 1981, and has read the briefs of the parties and being fully advised finds that BURLINGTON NORTHERN'S only duty in this case with respect to audible and visual warning devices on this locomotive at the time of the accident was to comply with the applicable federal regulations on the subject. The jury will not be permitted to deliberate on whether BURLINGTON NORTHERN had a duty to equip its engine in accordance with a standard exceeding those set by the regulations.

The Court finds that the federal government, pursuant to its plenary powers in the field of interstate commerce, has seen fit to pre-empt state action in determining the standard of care or duty required of the BN railroad insofar as equipping its railway engines with audible and visual warning devices is concerned.

The Court further finds that this order should not apply to the duty of the railroad with respect to signalization at crossings.

THEREFORE, IT IS ORDERED that the plaintiff, plaintiff's witnesses, and plaintiff's counsel be and each is hereby enjoined from mentioning, referring to or interrogating concerning, in the presence of the jury, the efficacy of, the availability of, the use of, or the propriety, legal or otherwise, of using locomotive mounted warning devices, either visual or audible, other than those required by appli-

cable federal regulations.

DATED this 4th day of September, 1981.

Leonard H. Langen
Judge of the District Court

APPENDIX "C"

BOILER INSPECTION ACT as amended,
45 U.S.C. 22-23, 28-43

§22. Inspection of locomotives and appurtenances; definitions.

When used in sections 23 and 28 to 34 of this title, the terms "carrier" and "common carrier" means a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The term "railroad" as used in said sections shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in said sections shall be held to mean persons actually engaged in or connected with the movement of any train.

Feb. 17, 1911, c. 103, § 1, 36 Stat. 913; June 7, 1924, c. 355, § 1, 43 Stat. 659.

§23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this title and are able to with-

stand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659.

§28. Rules and instructions as to inspection

Each carrier subject to this chapter shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after February 17, 1911, and such rules and instructions shall become obligatory upon such carrier. *Provided, however*, That if any carrier subject to this chapter shall fail to file its rules and instructions the director of locomotive inspection shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided also*, That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed with and approved by the Secretary of Transportation. The director of locomotive inspection shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however*, That all such rules and instructions shall be approved by the Secretary of Transportation before they take effect.

Feb. 17, 1911, c. 103 § 5, 36 Stat. 914; Apr. 22, 1940, ch. 124, § 1, 54 Stat. 148.

§29. Duties of district inspectors; inspection and repairs by carriers; notice to carrier of condition of boiler; appeal to director and reexamination; further appeal to Secretary

It shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the director of locomotive inspection or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of sections 22, 23, 28, 29, and 31 to 34 of this title, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Secretary of Transportation, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. Each carrier subject to such sections shall keep on file the report of each inspection required by such rules and regulations and the report showing the repair of the defects disclosed by the inspection. The rules and regulations referred to in this section shall prescribe the manner in which such reports shall be kept. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or the rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in service-

able condition: *Provided*, That a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may within five days after receiving said notice, appeal to the director of locomotive inspection by telegraph or by letter to have said boiler reexamined, and upon receipt of the appeal from the inspector's decision, the director of locomotive inspection shall assign one of the assistant directors of locomotive inspection or any district inspector other than the one from whose decision the appeal is taken to reexamine and inspect said boiler within fifteen days from date of notice. If upon such reexamination the boiler is found in serviceable condition, the director of locomotive inspection shall immediately notify the carrier in writing, whereupon such boiler may be put into service without further delay; but if the reexamination of said boiler sustains the decision of the district inspector, the director of locomotive inspection shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon the receipt of such notice the carrier may, within thirty days, appeal to the Secretary of Transportation, and upon such appeal, and after hearing, said Secretary shall have power to revise, modify or set aside such action of the director of locomotive inspection and declare that said locomotive is in serviceable condition and authorize the same to be operated: *Provided further*, That pending either appeal the requirements of the inspector shall be effective.

As amended Oct. 10, 1980, Pub.L. 96-423, § 13, 94 Stat. 1816.

§30. Powers and duties of inspectors, and provisions of certain sections applicable to all parts of locomotive and tender; examinations of inspectors

The director of locomotive inspection and the two

assistant directors of locomotive inspection, together with all the district inspectors, appointed as hereinbefore provided, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they have with respect to the boiler of a locomotive and the appurtenances thereof, and the provision of sections 22, 23, 28, 29, and 31 to 34 of this title as to the equipment of locomotives shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it applies to locomotive boilers and their appurtenances. All inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed.

Mar. 4, 1915, c. 169, § 2, 38 Stat. 1192; Apr. 22, 1940, c. 124, § 2, 54 Stat. 148.

§31. Annual report of director

The director of locomotive inspection shall make an annual report to the Secretary of Transportation of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire.

Feb. 17, 1911, c. 103, § 7, 36 Stat. 916; Apr. 22, 1940, c. 124, § 1, 54 Stat. 148.

§32. Report by carrier to director as to accident; preservation of disabled parts; investigation and report thereupon

In the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the director of locomotive inspection. Whereupon the facts concerning such accident shall be in-

vestigated by the director of locomotive inspection or one of his assistants, or such inspector as the director of locomotive inspection may be designate for that purpose. And where the locomotive is disabled to the extent that it cannot be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The director of locomotive inspection or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the director of locomotive inspection.

Feb. 17, 1911, c. 103, § 8, 36 Stat. 916; Apr. 22, 1940, c. 124, § 1, 54 Stat. 148.

§33. Reports by Secretary of Investigations

The Secretary of Transportation may at any time call upon the director of locomotive inspection for a report of any accident embraced in section 32 of this title, and upon the receipt of said report, if he deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as he deems proper. Such reports shall be made public in such manner as the Secretary deems proper. Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

Feb. 17, 1911, c. 103, § 8, 36 Stat. 916; Apr. 22, 1940, c. 124, § 1, 54 Stat. 148.

§34. Penalty for violations by carrier; duty of United States attorney to sue therefore; director to give information

Any common carrier violating the provisions of sections 22, 23, and 28 to 34 of this title relating to locomotives, their boilers, tenders, and so forth, or any rule or regulation made under such provisions or any lawful order of any inspector shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be assessed by the Secretary of Transportation and recovered in a suit or suits to be brought by the United States attorney in the district court of the United States for the judicial district in which such violation occurred or in which the defendant has its principal executive office; and it shall be the duty of such attorneys, subject to the direction of the Attorney General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the director of locomotive inspection to give informatin to the proper United States attorney of all violations coming to his knowledge.

As amended July 8, 1976, Pub.L. 94-348, § 3(c), 90 Stat. 818; Nov. 2, 1978, Pub.L. 95-574, § 7(c), 92 Stat. 2461; Oct. 10, 1980, Pub.L. 96-

§35. Investigations and report by Secretary on block-signal systems and appliances for automatic control of trains; evidence

The Secretary of Transportation is directed to investigate and report on the use of and necessity for block-signal systems and appliances for the automatic control of railway trains in the United States. For this purpose the Secretary is authorized to employ persons who are familiar with the subject, and may use such of his own employees as are necessary to make a thorough examination into the matter.

In transmitting his report to the Congress the Secretary shall recommend such legislation as to the Secretary seems advisable.

To carry out and give effect to the provisions of this section the Secretary shall have power to issue subpenas, administer oaths, examine witnesses, require the production of books and papers, and receive depositions taken before any proper officer in any State or Territory of the United States.

June 30, 1906, No. 46, 34 Stat. 838.

§36. Investigation and testing by Secretary of appliances or systems to promote safety

The Secretary of Transportation is authorized, at his discretion, to investigate, test experimentally, and report on the use and need of any appliances or systems intended to promote the safety of railway operation which may be furnished in completed shape to the Secretary for such investigation and test entirely free of cost to the Government. For this purpose the Secretary is authorized to employ persons familiar with the subject to be investigated and tested, and may also make use of his regular employees for such purposes.

May 27, 1908, c. 200, § 1, 35 Stat. 325.

§37. Inspection of mail cars

Hereafter all inspectors employed for the enforcement of the provisions of sections 1 to 7 of this title, as to safety appliances shall also be required to make examination of the construction, adaptability, design, and condition of all mail cars used on any railroad in the United States and make report thereon, a copy of which report shall be transmitted to the Postmaster General.

May 27, 1908, c. 200, § 1, 35 Stat. 324; Mar. 4, 1909, c. 299, § 1, 35 Stat. 965.

§38. Monthly reports of railroad accidents; duty of carrier to make

It shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Secretary of Transportation a monthly report, under oath, of all collisions, derailments, or other accidents resulting in death or injury to any person or damage to equipment or roadbed, arising from the operation of such railroad, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided*, That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the Secretary.

May 6, 1910, c. 208, § 1, 36 Stat. 350; Sept. 13, 1960, Pub.L. 86-762, § 1, 74 Stat. 903.

§39. Penalty for failure to make report

Any common carrier failing to make the report provided for in section 38 of this title within thirty days after the end of any month shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not more than $100 for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same. In lieu of the foregoing, any such carrier may be required to pay a civil penalty pursuant to subsections (b) and (c) of section 438 of this title.

As amended Jan. 3, 1975. Pub.L. 93-633, Title II, § 204(b), 88 Stat. 2166.

§40. Investigation by Secretary of accidents; cooperation with State commissions; reports of investigations

The Secretary of Transportation shall have authority to investigate all collisions, derailments, or other accidents

resulting in serous injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The Secretary, or any impartial investigator thereunto authorized by the Secretary, shall have authority to investigate, such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, and circumstances, and for that purpose may subpena witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and other evidence, and shall be provided by said carriers with all reasonable facilities: *Provided*, That when such accident is investigated by a commission of the State in which it occurred, the Secretary of Transportation shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the State commission investigation. The Secretary shall, when it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as he deems proper. Such reports shall be made public in such manner as the Secretary deems proper.

May 6, 1910, c. 208, § 3, 36 Stat. 351.

§41. Reports not evidence in suits for damages

Neither the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

May 6, 1910, c. 208, § 4, 36 Stat. 351.

§42. Rules and regulations; form of reports

The Secretary of Transportation is authorized to prescribe such rules and regulations and such forms for

making the reports hereinbefore provided as are necessary to implement and effectuate the purposes of sections 38 to 43 of this title.

May 6, 1910, c. 208, § 5, 36 Stat. 351; Sept. 13, 1960, Pub.L. 86-762, § 2, 74 Stat. 904.

§43. Definitions

(a) The term "interstate commerce," as used in sections 38 and 40 of this title, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in said sections, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

(b) The phrase "arising from the operation of such railroad", as used in sections 38 to 43 of this title, shall include all activities of the railroad which are related to the performance of its transportation business.

May 6, 1910, c. 208, § 7, 36 Stat. 351; Sept. 13, 1960, Pub.L. 86-762, § 3, 74 Stat. 904.

APPENDIX "D"

FEDERAL RAILWAY SAFETY ACT
as amended, 45 U.S.C. §§ 421-444.

§421. Congressional declaration of purpose

The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

Pub.L. 92-458, Title I, § 101, Oct. 16, 1970, 84 Stat. 971.

§431. Promulgation of rules, regulations, orders, and standards—Authority of Secretary; collective bargaining agreements under Railway Labor Act as consistent with rules, etc.

(a) The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act, including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be construed to give the secretary authority to issue rules, regulations, orders, and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

Hearings

(b) Hearings shall be conducted in accordance with the provisions of section 553 of Title 5 for all rules, regulations, orders, or standards issued by the Secretary including those establishing, amending, revoking, or waiving compliance with a railroad safety rule, regulation, order or standard under this subchapter, and an opportunity shall be provided for oral presentations.

Waiver of compliance; authority of Secretary

(c) The Secretary may, after hearing in accordance with subsection (b) of this section, waive in whole or in part compliance with any rule, regulation, order, or standard established under this subchapter, if he determines that such waiver of compliance is in the public interest and is consistent with railroad safety. The Secretary shall make public his reasons for granting any such waiver.

Consideration by Secretary of relevant existing safety data and standards; development and publication of rules of practice applicable to proceedings

(d) In prescribing rules, regulations, orders, and standards under this section, the Secretary shall consider relevant existing safety data and standards and shall, within 180 days after July 8, 1976, take such action as may be necessary to develop and publish rules of practice applicable to all proceedings under this chapter. Such rules of practice shall take into consideration the varying nature of proceedings under this chapter and shall include specific time limits upon the disposition of all proceedings initiated under this chapter. In no event shall the time limit for any such proceeding extend for more than 12 months after the date such proceeding is initiated.

Time for issuance; review and revision by Secretary

(e) The Secretary shall issue initial railroad safety rules, regulations, orders, and standards under this subchapter

based upon existing safety data and standards, not later than one year after October 16, 1970. The Secretary shall review and, after hearing in accordance with subsection (b) of this section, revise such rules, regulations, orders, and standards as necessary.

Judicial review

(f) Any final agency action taken under this section is subject to judicial review as provided in chapter 7 of Title 5.

Restricted access to rolling equipment during inspection, testing, etc. and visibility of rear car of trains; requirements; enforcement of State laws, etc.

(g) The Secretary shall, within 180 days after July 8, 1976, issue such rules, regulations, orders, and standards as may be necessary to require that—

(1) in any case in which activities of railroad employees (other than train or yard crews) assigned to inspect, test, repair, or service rolling equipment require such employees to work on, under, or between such equipment, each manually operated switch, including any crossover switch, providing access to the tract on which such equipment is located must be lined against movement to that track and secured by an effective locking device which may not be removed except by the class or craft of employees performing such inspection, testing, repair, or servicing.

(2) the rear car of all passenger and commuter trains shall have one or more highly visible markers which are lighted during periods of darkness or whenever weather conditions restrict clear visibility; and

(3) the rear car of all freight trains shall have highly visible markers during periods of darkness or whenever weather conditions restrict clear visibility.

Notwithstanding the provisions of section 434 of this title, nothing in paragraphs (2) and (3) of this subsection shall

prohibit a State from continuing in force any law, rule, regulation, order or standard in effect on July 8, 1976, relating to lighted markers on the rear car of freight trains except to the extent that such law, rule, regulation, order, or standard would cause such cars to be in violation of this section.

Safety of railroad passsenger equipment

(h) (1) The Secretary shall, within two years after October 10, 1980, issue such initial rules, regulations, orders, and standards as may be necessary to insure the safe construction, maintenance, and operation of railroad passenger equipment. The Secretary shall periodically review such rules, regulations, orders, and standards and shall, after a hearing in accordance with subsection (b) of this section, make such revisions in such rules, regulations, orders, and standards as may be necessary.

(2) In issuing initial rules, regulations, orders, and standards under this subsection, and in making any subsequent revisions thereto, the Secretary shall—

(A) concentrate on those areas which, in the judgment of the Secretary, present the greatest opportunity for enhancing the safety of railroad passenger equipment; and

(B) give significant weight to the expenditures that would be necessary to retrofit existing equipment and to alter specifications for equipment on order;

(3) In issuing initial rules, regulations, orders, and standards under this subsection, and in making any subsequent revisions thereto, the Secretary may consult with the National Railroad Passenger Corporation, public authorities that operate passenger service, other rail carriers that transport passengers, organizations of passengers, and organizations of employees. Such consultations shall not be subject to the Federal Advisory Committee Act, but minutes of such consultations shall be placed in

the public docket of the rulemaking proceeding.

(4) As used in this subsection, the term "railroad passenger equipment" means all railroad equipment used for the transportation of passengers, whether in commuter or intercity service.

As amended Pub.L. 94-348, § 5, July 8, 1976, 90 Stat. 819; Pub.L. 96-423, § 14, Oct. 10, 1980, 94 Stat. 1817.

§432. Emergency powers—Emergency situations; order of Secretary; abatement of situation

(a) If the Secretary determines, on the basis of testing, inspection, investigation, or research carried out pursuant to this subchapter, that an unsafe condition or practice, or a combination of unsafe conditions or practices, or both, create an emergency situation involving a hazard of death or injury to persons, the Secretary may immediately issue an order, without regard to the provisions of section 431 (b) of this title, imposing such restrictions or prohibitions as may be necessary to bring about the abatement of such emergency situation.

Review

(b) After the issuance of an order under this section, opportunity for review of such order shall be provided in accordance with section 554 of Title 5.

Thirty-day period for administrative review

(c) If a petition for review of an order has been filed under subsection (b) of this section but administrative review of such order has not been completed by the end of the thirty-day period beginning on the date such order was issued, such order shall cease to be effective at the end of such period unless the Secretary determines in writing that the emergency situation remains in existence.

Standards and procedures for relief

(d) In issuing any order under this section, the Secretary

shall describe the conditions or practices which create an emergency situation (as determined by the Secretary), and shall establish standards and procedures under which relief from such order may be obtained. Nothing in this subsection shall be construed to affect the discretion of the Secretary under this section to maintain an order in effect until the emergency situation has been abated.

Judicial relief if Secretary fails to act

(e) Any employee of a common carrier by railroad engaged in interstate or foreign commerce who may be exposed to imminent physical injury in the course of his employment because of the Secretary's failure, without any reasonable basis, to seek relief under subsection (a) of this section, or the authorized representative of such an employee, shall have the right to bring an action against the Secretary in the United States district court for the judicial district in which the emergency situation is alleged to exist or in which employer has its principal executive office, or for the District of Columbia, to compel the Secretary to issue an order under this section. The failure of the Secretary to seek relief under subsection (a) of this section shall be reviewed solely under the standards of section 706 of Title 5.

As amended Pub.L. 96-423, § 3, Oct. 10, 1980, 94 Stat. 1811.

§433. Grade crossings and railroad rights-of-way; comprehensive study and recommendations of means of elimination and protection

(a) The Secretary shall submit to the President for transmittal to the Congress, within one year after October 16, 1970, a comprehensive study of the problem of eliminating and protecting railroad grade crossings, including a study of measures to protect pedestrians in densely populated areas along railroad rights-of-way, together with his recommendations for appropriate action including, if relevant, a recommendation for equitable allocation of the economic

costs of any program proposed as a result of such study.

(b) In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem, as well as measures to protect pedestrians in densely populated areas along railroad rights-of-way.

Pub.L. 91-458, Title II, § 204, Oct. 16, 1970, 84 Stat. 972.

§434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Pub.L. 91-458, Title II, § 205, Oct. 16, 1970, 84 Stat. 972.

§435. Investigative and surveillance activities by State—Preconditions to State participation; annual certification by State agency to Secretary of activites; authority of Secretary to assess and com-

promise penalties, request injunctive relief, and recommend appropriate action

(a) A State may participate in carrying out investigative and surveillance activities in connection with any rule, regulation, order, or standard prescribed by the Secretary under this subchapter if the safety practices applicable to railroad facilities, equipment, rolling stock, and operations within such State are regulated by a State agency and such State agency submits to the Secretary an annual certification that such State agency—

(1) has regulatory jurisdiction over the safety practices applicable to railroad facilities, equipment, rolling stock, and operations within the State concerned;

(2) has been furnished a copy of each Federal safety rule, regulation, order, and standard, applicable to any such railroad facility, equipment, rolling stock, or operation, established under this subchapter as of the date of the certification;

(3) is conducting the investigative and surveillance activities prescribed by the Secretary as necessary for the enforcement by him of each rule, regulation, order, and standard referred to in paragraph (2) of this subsection, as interpreted by the Secretary.

The Secretary shall retain the exclusive authority to assess and compromise penalties and (except as otherwise provided by section 436 of this title) to request injunctive relief for the violation of rules, regulations, orders, and standards prescribed by the Secretary under section 431(a) of this title and to recommend appropriate action as provided by sections 438 and 439 of this title.

Report in annual certification; contents; determination by Secretary of compliance of State agency with prescribed activites; procedure for rejection of certification or enforcement action

(b) Each annual certification shall include a report, in such form as the Secretary may by regulation provide, showing—

(1) the name and address of each railroad subject to the safety jurisdiction of the State agency;

(2) all accidents or incidents reported during the preceding twelve months by each such railroad involving personal injury requiring hospitalization, fatality, or property damage exceeding $750 or such other higher amount as the Secretary may prescribe, together with a summary of the State agency's investigation as to the cause and circumstances surrounding each such accident or incident;

(3) the record maintenance, reporting, and inspection practices conducted by the State agency to aid the Secretary in his enforcement of rules , regulations, orders, and standards prescribed by him under section 431(a) of this title, including a detail of the number of inspections made of rail facilities, equipment, rolling stock, and operations by the State agency during the preceding twelve months; and

(4) such other information as the Secretary may require.

The report included with the first annual certification need not show information unavailable at that time. If after receipt of annual certification the Secretary determines that the State agency is not satisfactorily complying with the investigative and surveillance activities prescribed by him with respect to such safety rules, regulations, orders, and standards, he may, on reasonable notice and after opportunity for hearing, reject the certification, in whole or in part, or take such other action as he deems appropriate to achieve adequate enforcement. When such notice is given by the Secretary, the burden of proof shall be upon the State agency to show that it is satisfactorily complying

with the investigative and surveillance activities prescribed by the Secretary with respect to such safety rules, regulations, orders, and standards.

Agreements with noncertifying States for State agency action; procedure for termination of agreements

(c) With respect to any railroad facility, equipment, rolling stock, or operation for which the Secretary does not receive an annual certification under subsection (a) of this section, the Secretary may enter into an agreement with a State agency to authorize such agency to provide all or any part of the investigative and surveillance activities prescribed by the Secretary as necessary to obtain compliance with any Federal safety rule, regulation, order, or standard applicable to any such railroad facility, equipment, rolling stock, or operation. An agreement entered into under this subsection, or any provision thereof, may be terminated by the Secretary if, after notice and opportunity for a hearing, he finds that the State agency has failed to provide all or any part of the investigative and surveillance activities to which the agreement relates. Such finding and termination shall be published in the Federal Register, and shall become effective no sooner than fifteen days after the date of publication.

Expenditures by Federal government for State programs; maximum amount; preconditions

(d) Upon application by any State agency which has submitted a certification under subsection (a) of this section, or entered into an agreement under subsection (c) or (g) of this section, the Secretary shall pay, out of funds appropriated pursuant to this subchapter or otherwise made available, up to 50 per centum of the cost of the personnel, equipment, and activities of such State agency reasonably required, during the ensuing fiscal year, to carry out a safety program under such certification or agreement. No such payment may be made unless the State agency making appli-

cation under this subsection gives assurances satisfactory to the Secretary that the State agency will provide the remaining cost of such a safety program and that the aggregate expenditures of funds of the State, exclusive of Federal grants, for the safety program will be maintained at a level which does not fall below the average level of such expenditures for the last two fiscal years preceding October 16, 1970.

Monitoring by Secretary of State investigative and surveillance practices

(e) The Secretary is authorized to conduct such monitoring of State investigative and surveillance practices and such other inspection and investigation as may be necessary to aid in the enforcement of the provisions of this subchapter.

Applicability of certification to new or amended rule, regulation, order, or standard

(f) The certification which is in effect under subsection (a) of this section shall not apply with respect to any new or amended Federal safety rule, regulation, order, or standard for railroads established under this subchapter after the date of such certification until the State agency has submitted an appropriate certification in accordance with the provisions of subsection (a) of this section to provide the necessary inspection and surveillance activities in accordance with the provisions of such subsection.

Investigation and surveillance

(g) In addition to the provisions for State participation set forth in subsections (a) and (c) of this section, the Secretary may enter into agreements with any State to provide investigative and surveillance activities with respect to those functions transferred to the Secretary by section 1655(e)(1), (e)(2), and (e)(6)(A) of Title 49.

As amended Pub.L. 96-423, § 4, Oct. 10, 1980, 94 Stat. 1812.

§436. Enforcing compliance with Federal railroad safety rules, regulations, orders, and standards—Civil penalty; application for judicial assessment and collection

(a) (1) In any case in which the Secretary has failed to assess the civil penalty applicable under section 438 of this title with respect to a violation of any railroad safety rule, regulation, order, or standard issued under this subchapter or under any law transferred by section 1655(e) (1), (e) (2), or (e) (6) (A) of Title 49, within sixty days after the date on which notification was received by the Secretary from a State agency participating in investigative and surveillance activities under the provisions of section 435 of this title, that State agency may apply to the United States district court for the judicial district in which the violation occurred or in which the defendant has its principal executive office for the assessment and collection of the civil penalty included in or made applicable to such rule, regulation, order, or standard.

(2) The provisions of this subsection shall not apply in any case in which the Secretary has affirmatively determined in writing that no violation has occurred.

Application by State agency for injunctive relief when Secretary fails to commence action

(b) (1) In any case in which the Secretary has not commenced an action for injunctive relief under section 439 of this title with respect to a violation of any railroad safety rule, regulation, order, or standard issued under this subchapter or under any law transferred by section 1655(e) (1), (e) (2), or (e) (6) (A) of Title 49, within 15 days after the date on which the Secretary received notification of the violation, together with a request that an injunctive action be instituted, from a State agency participating in investigative and surveillance activities under the provisions of section 435 of this title, that State agency may apply to the

United States district court for the judicial district in which the violation occurred or in which the defendant has its principal executive office for injunctive relief to restrain further violation of such rule, regulation, order, or standard.

(2) The provisions of this subsection shall not apply in any case in which the Secretary has affirmatively determined in writing that (A) no violation has occurred, or (B) an action for injuctive relief is not necessary because of other enforcement action undertaken by the Secretary with respect to the subject violation.

United States District Courts within State

(c) A State agency may not bring an action under this section in any United States district court located outside the boundaries of the State.

As amended Pub.L. 95-574, § 8, Nov. 2, 1978, 92 Stat. 2461; Pub.L. 96-423, § 5, Oct. 10, 1980, 94 Stat. 1812.

§437. General powers—Authority of Secretary

(a) In carrying out his functions under this subchapter, the Secretary is authorized to perform such acts including, but not limited to, conducting investigations, making reports, issuing subpenas, requiring and reporting requirements, carrying out and contracting for research, development, testing, evaluation and training (particularly with respect to those aspects of railroad safety which he finds to be in need or prompt attention), and delegating to any public bodies or qualified persons, functions respecting examination, inspecting, and testing of railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary to carry out the provisions of this subchapter. The Secretary is further authorized to issue orders directing compliance with this chapter or with any railroad safety rule, regulation, order or standard issued under this chapter; the district courts of the United States shall have

jurisdiction, upon petition by the Attorney General, to enforce such orders by appropriate means.

Inspection and examination of rail facilities and records by officers, employees, or agents of Secretary; credentials; status as Federal employees

(b) To carry out the Secretary's responsibilities under this subchapter and under the functions transferred by section 1655(e) (1), (e) (2), and (e) (6) (A) of Title 49, officers, employees, or agents of the Secretary are authorized to enter upon, inspect, and examine rail facilities, equipment, rolling stock, operations, and pertinent records at reasonable times and in a reasonable manner. Such officers, employees, or agents shall display proper credentials when requested, and during the course of such inspection or examination shall be considered employees of the Federal Government for purposes of chapter 171 of Title 28.

Force and effect of orders, rules, regulations, standards, and requirements for purposes of determining liability of common carriers by railroad for injuries to employees

(c) All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this subchapter, or by any State agency which is participating in investigative and surveillance activities pursuant to section 435 of this title, shall have the same force and effect as a statute for purposes of the application of sections 53 and 54 of this title, relating to the liability of common carriers by railroad for injuries to their employees.

Transferred functions formerly vested in Interstate Commerce Commission

(d) (1) In carrying out the functions formerly vested in the Interstate Commerce Commission and transferred to the Secretary by section 1655(e) (1), (e) (2), and (e) (6) (A) of

Title 49, the Secretary is authorized to perform any act authorized in subsection (a) of this section that he considers necessary to carry out such transferred functions, including but not limited to, conducting investigations, making reports, issuing subpenas, requiring production of documents, taking depositions, and prescribing recordkeeping and reporting requirements. The Secretary is further authorized to issue orders directing compliance with the laws transferred by section 1655(e) (1), (e) (2), and (e) (6) (A) of title 49 or with any regulation or order issued thereunder.

(2) The district courts of the United States shall have juristiction, upon petition by the Attorney General, to enforce by appropriate means any order issued by the Secretary under paragraph (a) of this subsection.

As amended Pub.L. 93-633, Title II, § 206, Jan. 3, 1975, 88 Stat. 2166; Pub.L. 95-574, § 9, Nov. 2, 1978, 92 Stat. 2462; Pub.L. 96-423, § 6, Oct. 10, 1980, 94 Stat. 1813.

§438. Civil penalties—Unlawful acts

(a) It shall be unlawful for any railroad to disobey, disregard, or fail to adhere to any rule, regulation, order, or standard prescribed by the Secretary under this subchapter.

Amount

(b) The Secretary shall include in, or make applicable to, any railroad safety rule, regulation, order, or standard issued under this subchapter a civil penalty for violation thereof or for violation or section 39 of this title in such amount, not less than $250 nor more than $2,500, as he deems reasonable.

Assessment by Secretary; separate offense; procedure for recovery; compromise by Secretary; amount as deductible from any sums owed by United States to violator; payment into Treasury

(c) Any railroad violating any rule, regulation, order, or standard referred to in subsection (b) of this section shall be assessed by the Secretary the civil penalty applicable to the standard violated. Each day of such violation shall constitute a separate offense. Such civil penalty is to be recovered in a suit or suits to be brought by the Attorney General on behalf of the United States in the district court of the United States for the judicial district in which such violation occurred or in which the defendant has its principal executive office. Civil penalties may, however, be compromised by the Secretary for any amount, but in no event for an amount less than the minimum provided in subsection (b) of this section, prior to referral to the Attorney General. The amount of any such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged. All penalties collected under this subchapter, including penalties collected pursuant to section 436 of this title, shall be covered into the Treasury as miscellaneous receipts.

(d) In any action brought under this subchapter, subpenas for witnesses who are required to attend a United States district court may run into any other district.

Criminal penalty for false reporting

(e) Any person who knowingly and willfully—

(1) makes a false entry in any record or report required under this subchapter to be made, prepared, or preserved;

(2) destroys, mutilates, changes, or by another means falsifies any such record or report;

(3) does not enter required specified facts and transactions in any such record or report;

(4) makes, prepares, or preserves any such record or report in violation of a regultion or order issued under this subchapter; or

(5) files a false record or report with the Secretary,

shall be fined not more than $5,000, or imprisoned for not more than two years, or both.

As amended Pub.L. 93-633, Title II, § 204(a), Jan. 3, 1975, 88 Stat. 2165; Pub.L. 96-423, §§ 7, 8(a), Oct. 10, 1980, 94 Stat. 1814.

§439. Injunctive relief—Procedures and juristiction

(a) The United States district court shall, at the request of the Secretary and upon petition by the Attorney General on behalf of the United States, or upon application by a State agency pursuant to section 436 of this title, have jurisdiction, subject to the provisions of rules 65(a) and (b) of the Federal Rules of Civil Procedure, to restrain violations of this subchapter or to enforce rules, regulations, orders, or standards established under this subchapter and to restrain violations of or to enforce rules, regulations, orders, or standards established under any statute transferred to the Secretary under section 1655(e) (1), (e) (2), and (e) (6) (A) of Title 49.

Criminal contempt proceedings

(b) In any proceeding for criminal contempt for violation of an injunction or restraining order issued under this section or under section 436 of this title, which violation also constitutes a violation of this subchapter, trial shall be by the court, or, upon demand of the accused, by a jury, conducted in accordance with the provisions of rule 42(b) of the Federal Rules of Criminal Procedure.

Judicial districts where action may be brought

(c) Subject to section 436(d)[1] of this title, any action under subsection (a) of this section may be brought in the United States district court for the judicial district in which the violation occurred or in which the defendant has its principal executive office.

As amended Pub.L. 96-423, § 9, Oct. 10, 1980, 94 Stat. 1814.

§440. Annual report by Secretary; contents, recommendations for additional legislation; special report by Secretary

(a) The Secretary shall prepare and submit to the President for transmittal to Congress on or before July 1 of each year a comprehensive report on the administration of this subchapter for the preceding calendar year. Such report shall include, but not be restricted to—

[See main volume for text of (1) to (10); (b)]

(c) The Secretary shall prepare and submit to the President and the Congress, not later than March 17, 1976, a comprehensive railroad safety report. Such report shall—

(1) contain a description of the areas of railroad safety with respect to which Federal safety standards issued under this chapter are in effect (as of June 30, 1975);

(2) identify any area of railroad safety with respect to which Federal safety standards have been proposed but have not been issued under this chapter (as of June 30, 1975);

(3) identify any area of railroad safety with respect to which Federal safety standards have not been issued under this chapter (as of June 30, 1975);

(4) identify alternative and more cost-effective methods for inspection and enforcement of Federal safety standards, including mechanical and electronic inspection, and contain an evaluation of problems involved in implementing such alternatives, with specific attention to the need for cooperation with the railroad industry;

(5) identify the areas of railroad safety listed in accordance with paragraphs (1) through (3) of this subsection which involve, or which may involve, State participation under section 435 of this title;

(6) contain a description of the railroad safety program which is in effect or planned in each State (as of

June 30, 1975), including—

(A) State program development;

(B) State plans to participate in program areas listed in accordance with paragraph (1) of this subsection, which are not covered by a State certification or agreement;

(C) State interest in participating in each program area listed in accordance with paragraphs (2) and (3) of this subsection, following issuance of the applicable safety standards;

(D) annual projections of each State agency's needs for personnel, equipment, and activities reasonably required to carry out its State program during each fiscal year from 1976 through 1980 together with estimates of the annual costs thereof separately stated as to projections under subparagraphs (B) and (C) of this paragraph;

(E) the sources from which the State expects to draw the funds to finance such programs; and

(F) the amount of State funds and of Federal financial assistance[1] needed during each such fiscal year, by category;

(7) contain a detailed analysis of (A) the number of safety inspectors needed (by industry and Government respectively) to maintain an adequate and reasonable railroad safety program and record; (B) the minimum training and other qualifications needed for each such inspector; (C) the present and projected availability of such personnel in comparison to the need therefor; (D) the salary levels of such personnel in relation to salary levels for comparable positions in industry, State governments, and the Federal Government;

(8) evaluate alternative methods of allotting Federal funds among the States applying for Federal financial assistance, including recommendations, if needed, for a formula for such apportionment;

(9) contain a discussion of other problems affecting cooperation among the States that relate to effective participation of State agencies in the nationwide railroad safety program;

(10) contain a description of the regulations and handling criteria established by the Secretary under the Hazardous Materials Transportation Act specifically applicable to the transportation of radioactive materials by railroad (as of June 30, 1975), together with annual projections of the amounts of radioactive materials reasonably expected to be transported by railroad during each fiscal year from 1976 through 1980 and an evaluation of the need for additional regulations and handling criteria applicable to the transportation of radioactive materials by railroad during each such fiscal year; and

(11) contain recommendations for any additional Federal and State legislation needed to further realization of the objectives of this Act.

Such report shall be prepared by the Secretary, directly or indirectly, after research, examination, study, and consultation with the national associations representing railroad employee unions, railroad management, cooperating State agencies, the national organization of State commissions, universities, and other persons having special expertise or experience with respect to railroad safety. Such report shall include, in an appendix, a statement of the views of the national associations representing railroad employee unions, of the carriers, and of the national organization of State commissions with respect to the content of such report in its final form.

As amended Pub.L. 93-633, Title II, § 203, Jan. 3, 1975, 88 Stat. 2164; Pub.L. 94-56 § 2, July 19, 1975, 89 Stat. 263; Pub.L. 96-470, Title II, § 209(a), Oct. 19, 1980, 94 Stat. 2245.

§441. Protection and rights of employees—Filing of complaints; institution of proceedings; testimony

(a) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee because such employee, whether acting in his own behalf or in a representative capacity, has—

(1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the enforcement of the Federal railroad safety laws; or

(2) testified or is about to testify in any such proceeding.

Refusal to work under hazardous conditions

(b) (1) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if—

(A) the refusal is made in good faith and no reasonable alternative to such refusal is available to the employee;

(B) the hazardous condition is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that—

(i) the condition presents an imminent danger of death or serious injury; and

(ii) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory channels; and

(C) the employee, where possible, has notified his employer of his apprehension of such hazardous condition and of his intention not to perform further work unless such condition is corrected immediately.

(2) The provisions of this subsection shall not apply to security personnel employed by a railroad to protect persons and property transported by such railroad.

Resolution of disputes

(c) (1) Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(2) In the case of any violation of subsection (a) or (b) of this section, the Adjustment Board (or any division or delegate thereof) or any other board of ajustment created under section 153 of this title shall, where appropriate, award backpay to the aggrieved employee and order such employee reinstated to his position.

Election of remedies

(d) Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

Definitions

(e) As used in this section, the term "Federal railroad safety laws" means this Act, the Hazardous Materials Transportation Act and those laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e) (1), (2), and (6) (A) of section 1655 of Title 49.

Pub.L. 91-458, Title II, § 212, as added Pub.L. 96-423, § 10, Oct. 10, 1980, 94 Stat. 1815.

§442. Limitations on funding

Not less than 50 percent of the funds appropriated to the Secretary of Transportation for any fiscal year to conduct railroad research and development programs under the Federal Railroad Safety Act of 1970 or any other Act shall

be available for safety research, improved track inspection and data acquisition technology, improved rail freight service, and improved rail passenger systems.

Pub.L. 95-574, § 3, Nov. 2, 1978, 92 Stat. 2459.

§443. Pay classifications

Notwithstanding any other provision of law—

(1) the position held by a fully experienced and qualified railroad safety inspector employed by the Department of Transportation shall be classified in accordance with chapter 51 of Title 5 but not lower than Grade GS-12 of the General Schedule; and

(2) the position held by a railroad safety specialist employed by the Department of Transportation shall be classified in accordance with chapter 51 of Title 5 but not lower than Grade GS-13 of the General Schedule.

Pub.L. 91-458, Title II, § 213, as added Pub.L. 96-423, § 11, Oct. 10, 1980, 94 Stat. 1816.

§444. Authorization of appropriations

(a) There are authorized to be appropriated to carry out the provisions of this Act not to exceed $38,000,000 for the fiscal year ending September 30, 1981, and not to exceed $40,000,000 for the fiscal year ended September 30, 1982.

(b) The amounts appropriated under subsection (a) of this section for a fiscal year shall be available for expenditure in such fiscal year as follows:

(1) For the Office of Safety, including salaries and expenses for not more than (A) six hundred safety inspectors, (B) forty-five signal and train control inspectors, and (C) one hundred and twenty-five clerical personnel, not to exceed $22,500,000 for the fiscal year ending September 30, 1981, and not to exceed $24,000,000 for the fiscal year ending September 30, 1982. Such funds shall be available for travel expenses of safety inspectors for

not less than twenty days per month.

(2) To carry out the provisions of section 435(d) of this title, relating to State safety programs, not to exceed $2,000,000 for the fiscal year ending September 30, 1981, and not to exceed $2,500,000 for the fiscal year ending September 30, 1982.

(3) For the Federal Railroad Administration, for salaries and expenses not otherwise provided for, not to exceed $3,500,000.

(4) For conducting safety research and development activites under this Act, not to exceed $10,000,000, of which not less than $500,000 shall be available for assisting in the treatment of alcohol and drug abuse problems of railroad employees.

(c) Sums appropriated under this section for research and development, automated track inspection, and the State safety grant program are authorized to remain available until expended.

Pub.L. 91-458, Title II, § 214, as added Pub.L. 96-423, § 2, Oct. 10, 1980, 94 Stat. 1811.

APPENDIX "E"

Regulations

§230.231 Headlights.

(a) *Road locomotives.* Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

(b) *Headlights on rear end.* Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.

(c) *Dimmers.* Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations when meeting trains.

(d) *Leading locomotive.* When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight.

(e) *Yard locomotives.* Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in paragraph (a) of this section, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition.

§230.234 Whistle.

Each locomotive shall be provided with a suitable whistle, or its equivalent, so arranged that it may be conveniently operated by the engineer or motorman from his position in the cab.

§230.236 Location of headlights, sand boxes, bells, whistles.

Headlights, sand boxes, bells, and whistles shall be located in safe and accessible places. Where locomotives are equipped with overhead current collectors, headlights and sand boxes shall be so located, constructed, and arranged that they can be given necessary repairs and attention without requiring a person to mount the roof or become exposed to contact with parts carrying high tension.

In 1980, the foregoing regulations were modified as follows:

§229.125 Headlights.

(a) Each lead locomotive used in road service shall have a headlight that produces at least 200,000 candela. If a locomotive or locomotive consist in road service is regularly required to run backward for any portion of its trip other than to pick up a detached portion of its train or to make terminal movements, it shall also have on its rear a headlight that produces at least 200,000 candela. Each headlight shall be arranged to illuminate a person at least 800 feet ahead and in front of the headlight.

(b) Each locomotive or locomotive consist used in yard service shall have two headlights, one located on the front of the locomotive or locomotive consist and one on its rear. Each headlight shall produce at least 60,000 candela and shall be arranged to illuminate a person at least 300 feet ahead and in front of the headlight.

(c) Headlights shall be provided with a device to dim the light.

§229.129 Audible warning device.

(a) After August 31, 1980, each lead locomotive shall be provided with an audible warning device that produces a minimum sound level of 96db(A) at 100 feet forward of the locomotive in its direction of travel. The device shall be arranged so that it can be conveniently operated from the engineer's normal position in the cab.

(b) Measurement of the sound level shall be made using a sound level meter conforming, at a minimum, to the requirements of ANSI S1.4-1971, Type 2, and set to an A-weighted slow response. While the locomotive is on level tangent track, the microphone shall be position 4 fee above the ground at the center line of the track, and shall be oriented with respect to the sound source in accordance with the manufacturer's recommendations.

(c) A 4dB(A) measurement tolerance is allowable for a given measurement.

APPENDIX "F"

Montana Rule of Appellate Civil Procedure

Rule 17. Acceptance and manner of conducting.

(a) When accepted. The supreme court is an appellate court but it is empowered by the constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

(b) How commenced and conducted. Proceedings commenced in the supreme court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, supervisory control, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these additional rules. All papers filed shall conform to the requirements of Rule 27, except that typewritten applications, briefs, copies or exhibits and the like may be used without securing permission of the chief justice as required by Rule 27(a). The provisions of Rule 27(b) shall be observed.

(c) Applications — where and when filed: An original application may be made to the supreme court at any time. The moving party's application and all supporting documents shall be filed with clerk of the supreme court.

(d) Applications — what to contain. The application for the issuance of the above writs or orders must set forth, in addition to the other requisite matters, the particular

questions and issues anticipated or expected to be raised in the proceeding and also the fact which renders it necessary and proper that the writ should issue originally from the supreme court; the said matters will be taken into consideration by the court in determining the necessity and propriety of accepting jurisdiction and granting the alternative writ or order to show cause. Each application shall also set forth as exhibits, without repetition of title of court and cause, a copy of each judgment, order, notice, pleading, document proceeding or court minute referred to in the application, or which is necessary to make out a prima facie case or to substantiate the pleading or conclusion or legal effect. A memorandum or authorities must be filed with the application. Counsel shall file with the clerk of this court the original court file unless for some reason the same is not available.

(e) Procedure: The supreme court shall consider an application for an extraordinary writ at the court's next conference following the filing of the application. On the basis of the application filed, the court shall as promptly as possible, dismiss the petition, accept jurisdiction, or order a response reserving the question of jurisdiction. Only in extraordinary cases will the court grant oral argument to determine the necessity and propriety of accepting jurisdiction.

Unless oral argument is ordered by this court in order to establish jurisdiction, the court will enter an appropriate order forthwith. Such order may dismiss the petition, grant the relief requested, order a hearing on the application, or issue any other writ or order deemed appropriate in the circumstances.

(f) Oral argument: When ordered by this court, an adversary hearing on the application shall be held at the time fixed by the order. The oral argument shall be conducted in the same manner as in the argument of appeals with the same time limits for presentation, and with the applicant

opening and closing the argument.

(g) Briefs: In those cases in which oral argument is ordered, each party shall serve and file briefs in full conformance with Rules 20, 23, and 27, and containing a statement of the facts and of the points of law applicable, with the authorities relied upon.

All briefs shall be served and filed according to the time schedule set forth in the order, and in no event later than 24 hours prior to the time fixed for oral argument.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
MAY 13 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1974

IN THE

Supreme Court of the United States

October Term, 1982

JACK HENRY, individually and as Personal Representative of the Estate of Lorene Henry, deceased,
Relator and Appellee,

vs.

THE DISTRICT COURT OF THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PHILLIPS, AND THE HONORABLE LEONARD H. LANGEN, JUDGE THEREOF,
Respondent,

and

BURLINGTON NORTHERN, INC.,
Respondent and Appellant.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

APPELLEE'S MOTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

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Great Falls, MT 59403

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MOTION TO DISMISS OR AFFIRM

The Appellee moves this Court as follows:

1. For an order dismissing the appeal on the ground that the order appealed from is not a final order and is not appealable; or

2. For an order dismissing the appeal on the ground that it does not present a substantial federal question; or

3. For an order affirming the opinion on the ground that it was correctly decided.

INTRODUCTION

In his complaint in a Montana District Court, Appellee alleged that even though the Appellant is involved in many collisions with motorists at grade crossings in Montana every year, it fails and refuses to install warning lights, such as strobe lights or oscillating lights, on its locomotives to give added protection, warning, and notice to motorists of the approach of its locomotives to otherwise unprotected grade crossings, and, in fact, has removed warning devices from locomotives with which they were previously equipped when belonging to various railroad lines merged into what is and was the Burlington Northern, Inc. at the time of the subject accident.

The Appellant in the District Court below moved *in limine* to exclude all mention of locomotive-mounted warning devices, either visual or audible, other than those which were actually mounted upon the locomotive unit involved in this accident. The District Court granted the motion. A Writ of Supervisory Control was filed with the Supreme Court of the State of Montana which, after briefs were filed by the parties, heard oral argument *en banc* and unanimously rejected the position of Appellant and sent the matter back to the State District Court for a jury trial, which trial will commence on May 17, 1982.

STATEMENT OF POSITION

The Montana Supreme Court has shown a strong state interest in the safety of motorists at grade crossings in the state of Montana, and, consequently, this Court should not undertake to make an interlocutory, pre-evidentiary ruling in this case.

Secondly, Appellee contends that the position of the Montana court is clearly correct.

ARGUMENT

I. THE BOILER INSPECTION ACT AS AMENDED, 45 U.S.C. §§22-23, 28-43, ADDRESSES ONLY THE AMOUNT OF ILLUMINATION REQUIRED FROM A HEADLIGHT WITH WHICH LOCOMOTIVES MUST BE EQUIPPED.

The appropriate section of C.F.R. reads [in part] as follows:

"LIGHTS

Sec. 230.231 *Headlights.*

(a) *Road locomotives.* Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition ..."

The portions of this C.F.R. regulation include such things as dimmers, cab lights, location of headlights, sand boxes, bells, and whistles, but nothing relating to devices such as strobe or oscillating lights designed solely for the purpose of alerting motorists of the approach of such locomotives to grade crossings.

Obviously, this statute preempts only the field of headlight illumination to enable a person in the cab of a locomotive to see a dark object as large as a man at a distance of at least 800 feet ahead and in front of such headlight.

Federal legislation and preemption shall be strictly construed. *Commonwealth Edison Co., et al, v. State of Montana, et al,* 69 L.Ed.2d 884, 101 S.Ct. 889 (1981); *Pacific Legal Foundation v. State Energy Resources Conservation Figure and Development Commission,* 659 F.2d 903 (1981).

Appellant cites many cases which correctly stand for the general principles set forth therein, but which are not germane to the issue here involved.

The sole case relied upon by Appellant involving the Boiler Inspection Act, *Brown v. Chicago R.I. and P. R.R.,* 108 F.Supp. 164 (M.D. Iowa 1952), correctly held that the Iowa legislature could not enact a statute requiring illumination from the headlight of a locomotive to exceed the standard set forth in the Boiler Inspection Act so as to require illumination strong enough to enable the operator of the locomotive to plainly discern an object the size of a man lying prone on the track a distance of 1100 feet from the headlight.

Appellant cites no other relevant cases and none contrary to the opinions of the Montana Supreme Court in the cases of *Runkle v. Burlington Northern,* et al, 613 P.2d 982, and *Henry v. Burlington Northern,* 39 St. Rptr. 430 (1982), from which this appeal emanates.

In *Runkle,* the Montana Supreme Court, after stating that the Federal Aid Highway Act of 1973, which represents an effort by the federal government to improve the safety of grade crossings and to provide funding for the same, does not lessen in any degree either statutory or common law obligations of the railroad to maintain a good and safe crossing, and then addressed the issue at hand in the following language:

> Thus it may not be enough for the railroad to protect its crossing with a standard crossbuck, to operate a train within a speed limit or to blow the whistle and ring the

> bell. The jury is still permitted to determine whether the railroad exercised reasonable care and caution under the circumstances and conditions existing at the time of the accident. Whether a railroad is negligent in a particular manner, such as in failing to provide automatic crossing gates, oscillating headlights, flasher lights, or in failing to reduce its speed is a question of fact for the jury. DeElena v. Southern Pac. Co. (1979), 121 Ariz. 563, 592 P.2d 759, 652; Seaboard Coast Line R. Co. v. Buchman, (Fla. App. 1978), 358 So.2d 836, 839-40.

Again, the Montana Supreme Court below in *Henry*, addressed the specific issue of "Whether federal legislation has preempted the state from imposing a common law duty on railroad carriers to have additional warning devices mounted on their locomotives." The Montana Supreme Court dealt with the contention of the Appellant that the Federal Railroad Safety Act and Boiler Inspection Act have preempted all state standards, statutes, and common law doctrines affecting railroad safety, and rejected its conclusion that the only obligation of the Burlington Northern in this case was to equip its locomotives in accordance with the standards set forth in the Boiler Inspection Act and Federal Railway Safety Act.

After citing the same language from *Runkle* set forth above, the Montana Court again said:

> "It is clear from the language in *Runkle* that a jury should be permitted to deliberate on whether Burlington Northern had a common-law duty to equip its locomotives with various warning devices."

After quoting other jurisdictions that support the position of the Montana Supreme Court, it stated:

> "Respondents contention that this case involves preemption is misplaced. The doctrine of preemption deals with federal and state relations under the supremacy clause of Article XI of the United States Constitution. There is no conflict in this case between a federal statute and a state statute. Further by allowing a jury to determine if the Burlington Northern violated its common law duty, this court is not implementing its own standard."

The Montana Supreme Court misspoke itself when it then said that the Federal Railway Safety Act, 45 U.S.C. §§421-444, provides that engines must be equipped with a headlight which will illuminate a person on the track at a distance of 800 feet. That language, of course, is found in the Boiler Inspection Act and was obviously an error in transcription. In any event, the Montana Supreme Court continued to state that there is not a federal act which governs warning systems on the engines and that its proof sought to be offered relates to warning and not to illumination and held that Congress has preempted the area of illumination devices, but not warning devices.

The Court will note that the Appellant has not drawn this Court's attention to any federal enactment governing warning systems on the engines because there is none.

FEDERAL RAILWAY SAFETY ACT, 45 U.S.C. §§421-444

By the terms of this Act, regulations may be promulgated governing railroad safety by the Secretary of Transportation through the Federal Railway Administration. The F.R.A., however, has chosen to pass no rules or regulations or standards of any kind whatsoever, and until the right is exercised in the area here involved, there is no federal preemption of on-board warning and alerting devices for the protection of motorists at grade crossings.

NO SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED

Federal preemption, as pointed out, shall be strictly construed. The argument of Appellant would do violence to the common understanding of plain, unambiguous language such as contained in the Boiler Inspection Act and the Federal Railroad Safety Act referred to. The concern of the Montana Supreme Court for the safety of the citizens of the State of Montana does not concern headlight illumination down the track, and simply reaffirms common law principles and duties essential to man's relations with man. No substantial federal question has been raised.

THE OPINION OF THE MONTANA SUPREME COURT WAS CORRECTLY DECIDED

The thrust of the decision below is that the jury, which will be hearing this case before this brief reaches the Clerk of this Court, can decide from the evidence whether the Appellant failed in its common law duty to exercise reasonable care for the safety of, in this case, the Appellee and his decedent wife. Montana is a large, rural state. There are many rural grade crossings with no signalization and marked only with a passive crossbuck.

On-board warning alerting devices such as oscillating or strobe lights are ideal for informing Montana motorists at a great distance of the approach of a train which otherwise is often indistinguishable from the terrain and background objects and lights. If the railroad will not signalize these crossings, slow its trains to provide safety for motorists, or provide flagmen to protect the crossing, then the jury should certainly be permitted to decide whether the Appellant should at least equip its locomotive with warning and alerting devices to reduce the appalling number of accidents at grade crossings in Montana.

CONCLUSION

Appellant is asking this Court for an interlocutory order which could not be made before the trial in the State District Court below. Even if this appeal were timely, it should be dismissed or the judgment of the Montana court affirmed.

Respectfully submitted,

/s/ John C. Hoyt

John C. Hoyt
Attorney for Appellee

CERTIFICATE OF SERVICE

The undersigned, JOHN C. HOYT, a member of the Bar of the Supreme Court of the United States, does hereby certify that he served copies of the Appellee's Motion and Brief in Support of Motion to Dismiss or Affirm on the 11th day of May, 1982, by mailing three copies each to the following:

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Appellant's Reply Brief

Office - Supreme Court
FILED
MAY 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1974

In the Supreme Court of the United States

October Term, 1981

JACK HENRY, individually and as Personal Representative of the Estate of Lorene Henry, deceased,

Relator and Appellee,

vs.

THE DISTRICT COURT OF THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PHILLIPS, AND THE HONORABLE LEONARD H. LANGEN, JUDGE THEREOF,

Respondent

and

BURLINGTON NORTHERN, INC.

Respondent and Appellant.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1974

JACK HENRY, individually and as Personal Representative of the Estate of Lorene Henry, deceased, Relator and Appellee,

v.

THE DISTRICT COURT OF THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PHILLIPS, AND THE HONORABLE LEONARD H. LANGEN, JUDGE THEREOF,

and

BURLINGTON NORTHERN, INC.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Appellee Henry filed with this Court a motion to dismiss or affirm and a brief in support thereof. He asserts that a ruling on this appeal would be an "interlocutory, pre-evidentiary ruling." He does not explain this argument, nor cite any authority in support thereof. Burlington Northern, Inc.'s (BN) position is that under rules recently established by this Court, the order appealed from in this case is a final judgment for purposes of this appeal.

Appellee's second argument is that the order entered by the Montana Supreme Court clearly is correct. BN respectfully asserts that the Montana Court seriously erred in its interpretation of federal statutory and constitutional law.

ARGUMENT

1. *This Appeal Is Taken From A Final Judgment Of The Montana Supreme Court.*

As set forth on pages 3 and 4 of Burlington Northern's jurisdictional statement, the decision of the Montana Supreme Court is a final judgment for purposes of this appeal. Montana Rule of Appellate Civil Procedure 17(b) provides that applications for writs of supervisory control are original proceedings. Rule 17(c) provides that such original applications may be made to the Supreme Court at any time. See Jurisdictional Statement Appendix "F" at 50a. The Supreme Court's order on Henry's application for a writ of supervisory control thus was a final resolution of that original proceeding.

In addition, the federal question has been finally decided by the state court. The railroad is precluded from raising this issue at the trial of this case. If the railroad prevails in the said trial, the federal issue will be moot. If the railroad does not prevail, governing state law will not permit again raising the federal claims on appeal. Under these circumstances, the fact that further proceedings are contemplated does not preclude judicial review. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). Indeed, if BN had failed to appeal from the Montana Supreme Court's ruling, it may have waived its right to appeal in the future.

Accordingly, this appeal does not seek "an interlocutory, pre-evidentiary ruling." This appeal seeks the review of a state court order on an important issue of federal statutory and constitutional law.

2 . *The Montana Supreme Court Erred In Ruling That No Question of Preemption Was Involved.*

As the district court below held, "the federal government, pursuant to its plenary powers in the field of interstate commerce, has seen fit to preempt state action [regarding

audible and visual warning devices on locomotives]." See Jurisdictional Statement Appendix "B" at 10a. In arguing that the state supreme court's reversal of this ruling was proper, appellee raises arguments regarding the scope of the federal regulation and the intent underlying the supreme court's ruling.

Appellee's arguments do not, however, refute the fact that substantial federal questions have been raised. Appellee's brief represents to this Court that *Brown v. Chicago R.I. & P. Rr.*, 108 F.Supp. 164 (M.D. Iowa 1952) is the only relevant case relied upon by BN. This clearly is inaccurate. See Jurisdictional Statement at 8-22. Many significant decisions are cited and, if a brief on the merits of this case is allowed, the arguments will be elaborated. Appellee does not even attempt to dispute that a significant question has been raised under the Interstate Commerce Clause.

Appellee admits that the Montana Supreme Court erred in stating that the headlight regulation appears on the Federal Railway Safety Act. See Appellee's Motion and Brief in Support of Motion to Dismiss or Affirm at 5. Appellee then state that this language appears in the Boiler Inspection Act. This, too, is in error. The applicable requirements were found in 49 C.F.R. §230.231, which required:

> Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive. . . to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight. . .

See Jurisdictional Statement Appendix "E" at 47a. This regulation was amended in 1980. *Id.* at 48a.

In the Federal Railway Safety Act, Congress determined that where the Secretary of Transportation has promulgated a regulation, state actions are preempted. That act provides at 45 U.S.C. §434:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railway safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to road safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. . . .

In 49 C.F.R. §230.231, the Secretary had adopted a rule regarding lighting equipment on locomotives, thereby preempting state action on the matter.

Appellee would distinguish illumination devices such as those required in the regulation from oscillating lights and strobe lights. Counsel sets forth his opinion regarding the desirability of such lights. Such desirability, however, is a determination that the Secretary of Transportation, after studies into the matter, has not yet made. Congress, meanwhile, has determined that the regulations should be uniform. Where the federal government has acted, a state may adopt a more stringent rule, such as requiring additional lights, only "when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce." 45 U.S.C. §434. Although each one of these three requirements would have to be met, appellee has made no claim to meeting any one of them. Requiring additional lights would not relate solely to a local safety hazard. In addition, as demonstrated in BN's jurisdictional statement, there is a substantial question whether such regulation would constitute an undue burden on interstate commerce. See Jurisdictional Statement at 18-22.

Appellee argues that the Montana Supreme Court "has shown a strong state interest in the safety of motorists at grade crossings in the State of Montana. . . ." The court's opinion, however, did not enter into any kind of balancing of state versus federal interests. The court did not even

discuss the state's interest in regulating railway safety. It summarily concluded that it did not believe that there was even a federal preemption question involved in this case. See Jurisdictional Statement Appendix "A" at 7a.

Finally, BN again would underline the fact that it is not arguing that appellee's entire negligence action is preempted. Appellee may still argue that the speed of the train was excessive or that BN officials or employees were otherwise negligent. The issue of locomotive equipment, however, has been preempted by federal law.

CONCLUSION

Appellee's motion to dismiss or affirm should be denied. Probable jurisdiction shoud be noted.

Respectfully submitted,

s/ Jack Ramirez
JACK RAMIREZ

CAROLYN S. OSTBY
Attorneys for Appellant.

CERTIFICATE OF SERVICE

The undersigned, CAROLYN S. OSTBY, a member of the Bar of the Supreme Court of the United States, does hereby certify that she served copies of the Appellant's Brief in Opposition to Motion to Dismiss or Affirm on the 24th day of May, 1982, by mailing three copies each to the following:

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